

The Administrative Law Judge (ALJ) determined claimant suffered accidental injury arising out of and in the course of her employment with respondent and awarded her compensation for a 10 percent permanent partial functional impairment.

The respondent requests review and argues claimant did not meet her burden of proof to establish she was injured at work. Respondent contends claimant's actual job duties did not require the repetitive lifting, bending and twisting nor weight lifting requirements that she described. And Dr. Paul S. Stein opined that if claimant's job duties matched those depicted in a video of her job duties then her injury could not have been related to that work.

Conversely, claimant argues that she met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment. Claimant further argues that Dr. Edward J. Prostin's opinion is more persuasive and should be adopted. Consequently, claimant requests that her award be increased to reflect a 12 percent functional impairment.

The issues for Board determination are whether claimant suffered accidental injury arising out of and in the course of her employment and, if so, the nature and extent of her injury.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed in light assembly for respondent. Her job duties required that she retrieve parts, assemble them and pack the finished product. She testified her job required a lot of lifting, bending, twisting, and squatting to get parts off a shelf or from under a shelf. She also testified the parts weighed from 1 to 40 pounds.

In early October 2004 claimant began to experience a gradual onset of right sided low back pain which went down into her legs. Claimant could not recall any specific injury other than the constant lifting. She did note that certain described parts changed from 40 pieces in a box to 120 pieces to a box. The latter boxes weighed 42 pounds and were too heavy for claimant to lift. Claimant would drag the boxes over to her work station.

Claimant notified her supervisor at the end of October 2004 about her ongoing back problems and that her work activities were causing her back problems. Claimant sought treatment with her family physician, Dr. Earl Walter. Dr. Walter prescribed pain pills, rest and took claimant off work from November 15, 2004 through January 17, 2005. She then returned to work for three days and was again taken off work.

¹ At the regular hearing the claimant testified that she was no longer employed by respondent, nevertheless, she neither requested nor offered evidence to support a finding of work disability (a permanent partial general disability greater than the functional impairment rating) as a result of her accidental injury.

On December 17, 2004, claimant was examined by Dr. Edward J. Prostic and provided a history that as she was twisting to push a cart weighing 40-50 pounds she aggravated her low back. Dr. Prostic recommended treatment consisting of epidural steroid injections. He further noted claimant could perform light-duty work as long as she could change position as necessary for comfort.

The claimant was seen by both Drs. Philip R. Mills and Paul S. Stein who did not recommend surgery. On January 5 or 6, 2005, claimant was delivering an off work slip to respondent when she slipped and fell inside the lobby at respondent's office. But claimant noted that incident did not worsen her back condition.

After a February 10, 2005 preliminary hearing, the ALJ ordered respondent to provide claimant with medical treatment. Dr. Paul Stein provided claimant conservative treatment.

Dr. William O. Reed Jr., a board certified orthopedic surgeon, first treated claimant on November 29, 2004, upon referral from her family physician, Dr. Walters. Claimant complained of low back pain radiating down both legs, more to the left than right side. She also had an MRI scan which revealed a herniated nucleus pulposus at L4-5. She had previously had surgery at L5-S1. Dr. Reed next saw claimant a year later on December 1, 2005, apparently upon referral from Dr. Stein.

On December 13, 2005, Dr. Reed reviewed a myelogram and CT scan which confirmed a herniated nucleus pulposus at L4-5. Because conservative treatment failed to resolve claimant's pain, Dr. Reed recommended surgery consisting of an arthroscopic microdiscectomy at L4-5. Dr. Reed performed the recommended surgery in January 2006. The doctor determined claimant reached maximum medical improvement in March 2006 and claimant was released to return to work without restrictions. Dr. Reed opined claimant suffered an 8 percent permanent partial functional impairment pursuant to the Fourth Edition of the *AMA Guides*².

Dr. Edward J. Prostic, a board certified orthopedic surgeon, examined claimant again on April 24, 2006, at the request of her attorney. Dr. Prostic concluded that claimant had injured the L4-5 disk for which she was operated. Dr. Prostic further concluded that claimant's work activities caused or contributed to her condition. Dr. Prostic opined claimant suffered a 12 percent functional impairment based upon the *AMA Guides*. Dr. Prostic imposed restrictions against lifting weights greater than 25 pounds occasionally or 10 pounds frequently. Claimant should avoid frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, or captive positioning.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Catherine Lynch, respondent's human resource manager, testified that the line where claimant worked produced inversion valves which weigh approximately two pounds. Ms. Lynch also videotaped an operator on claimant's line building the product. The videotape depicts an operator stocking the line by placing small parts in bins at her station for later use in building the product. The operator stated that stocking the line usually occurred once a day. The operator also picked up containers which were filled with some of the larger parts and carried them to her work station. The operator bent down to pick up the containers. The operator also picked up a wooden pallet and placed it on a push cart. The push cart was then moved over close to the work station. The operator then constructed boxes on the pallet and the finished product was packed into the boxes. The parts are assembled at a u-shaped table and the operator can either sit at a chair or stand while assembling the product. After the product is assembled it is bagged and placed in a box sitting on a wood pallet.

On cross-examination, Ms. Lynch agreed that she did not know if the packaging for any of the items had changed since claimant last worked on the line that was videotaped. Claimant testified that the videotape was not accurate in that almost everyone did the job sitting down which requires more bending and twisting to reach for parts. And claimant noted the videotape did not depict the pistons that came in a box that she had to bend over and drag to the work station. Claimant also filled her bins of parts more than once a day as depicted on the videotape. Claimant also testified that she was involved in lifting more boxes of finished product than depicted on the videotape.

The claimant's husband, a former employee at respondent, testified that he observed claimant performing her job and she was required to bend, lift, and twist. But he never personally performed that job.

After watching the videotape depicting an operator allegedly performing the same job that the claimant alleged caused her back condition, Dr. Stein in a follow-up report dated November 15, 2005, opined that if the work activity reasonably depicted claimant's job, then it did not appear likely that such activity would be causally related to claimant's lower back problem.³

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.⁴ "Burden of proof" means the burden of a party to persuade the trier of

³ Reed Depo., Ex. 1.

⁴ K.S.A. 44-501(a); See also, *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁵

An accidental injury is compensable under the Workers Compensation Act where the accident arose out of and in the course of employment.⁶ The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.⁷

The claimant testified that as she performed her work duties she suffered a gradual onset of back and leg pain from her bending, lifting and twisting activities. Dr. Prostic testified that claimant's work activities aggravated and caused her back condition. The Board affirms the ALJ's finding that claimant has met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment.

The Board is mindful of Dr. Stein's written opinion that the work activities depicted in the videotape would not cause claimant's low back condition. But the doctor's opinion was qualified by the disclaimer that his opinion was based upon the fact that the work activities claimant performed were the same as those depicted on the videotape. Upon viewing, the videotape revealed work activities which required bending, twisting and lifting. And the weights of the items were not appreciably different than claimant's testimony. Moreover, claimant testified that she did more bending and lifting and that when she was working, the pistons came in boxes of 120 rather than the 40 as depicted on the videotape. While the frequency of the offending bending, twisting and lifting might have been less than suggested by claimant, nonetheless, there was sufficient lifting activity depicted on the videotape to cause injury to the back. Accordingly, the Board finds Dr. Prostic's causation testimony is more persuasive than Dr. Stein's qualified opinion.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.⁸

Both Drs. Reed and Prostic offered functional impairment ratings based upon the *AMA Guides*. Dr. Reed opined claimant suffered an 8 percent permanent partial functional impairment. Dr. Prostic opined claimant suffered a 12 percent permanent partial functional impairment. The ALJ accorded both opinions equal weight and awarded claimant

⁵ K.S.A. 2004 Supp. 44-508(g).

⁶ K.S.A. 44-501(a); *Baxter v. L.T. Walls Constr. Co.*, 241 Kan. 588, 738 P.2d 445 (1987).

⁷ *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

⁸ K.S.A. 44-510e(a).

compensation based upon a 10 percent whole person functional impairment. The Board agrees and affirms.

Even though the ALJ's Award approves claimant's attorney fees, the record does not contain a filed fee agreement between claimant and his/her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he/she must file and submit his/her written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated March 2, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Cowger, Attorney for Claimant
Matthew M. Hogan, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge